

MEMORANDUM

DATE April 19, 2024

TO Massachusetts Society for the Prevention of Cruelty to Animals

FROM Dechert LLP

RE Town of Arlington Proposed Bylaw – Right to Pet Companionship

I. BACKGROUND

Town of Arlington resident Paul Schlichtman and ten other local animal advocates (“Proponents”) have proposed the addition of Article 17 – Right to Pet Companionship (the “Proposed Bylaw”) to Title V – Regulations Upon the Use of Private Property of the Bylaws of the Town of Arlington. As amended, the Proposed Bylaw would, among other things, make it unlawful for a property owner to refuse to rent or lease housing to any person because he or she has or intends to have a companion animal in the housing unit (the “Requirement to Allow Pets”). The Proposed Bylaw would not preclude a property owner from enforcing reasonable rules relating to the number and size of companion animals based on the size of the dwelling unit, provided that these rules permit at least one dog or two cats in any housing unit and that there would be exceptions for condominiums, owner-occupied dwellings and if a legitimate, significant, and unavoidable hardship exists that will harm the property owner’s health or well-being.

We understand that you support the Proposed Bylaw because pet owners in Massachusetts are often forced to surrender their pets to shelters due to the fact they cannot find inclusive housing. We further understand that you have been working with the Proponents to advocate for the passing of the Proposed Bylaw. In connection with these efforts, you engaged us to assist you with researching certain concerns regarding the Proposed Bylaw that were raised by Town Counsel Michael C. Cunningham and Deputy Town Counsel Jaclyn Munson (together, “Town Counsel”) in a March 23, 2024 memorandum to the Arlington Select Board (“Select Board”) (the “March 23 Memo”)¹ and during a March 26 Select Board meeting (the “March 26 Meeting”).² In particular: (1) in the March 23 Memo, Town Counsel raised concerns that the Proposed Bylaw conflicts with the Fair Housing Act (the “FHA”); and (2) during the March 26 Meeting, Town Counsel raised concerns that the Proposed Bylaw could cause the Town of Arlington to be sued for tortious interference with contract.

¹ Michael C. Cunningham & Jaclyn Munson, *Re: Annual Town Meeting Warrant Articles: 15, 16, 17, 18, 19 and 53.* (Mar. 23, 2024).

² Select Board Meeting - March 26, 2024, found at: https://www.youtube.com/watch?v=MdcfIElO_4s.

This memorandum summarizes our findings. As discussed in further detail herein, we believe that: (1) the Proposed Bylaw’s Requirement to Include Pets does not conflict with the FHA; and (2) it is unlikely that the Proposed Bylaw’s Requirement to Include Pets would give rise to a successful tortious interference with contract claim.

I. THE FAIR HOUSING ACT

The FHA is a federal statute that prohibits discrimination on the basis of certain protected classes, including race, color, religion, sex, handicap, familial status, or national origin, in the renting and sale of most residential dwellings.³ The March 23 Memo states that the Proposed Bylaw “likely...conflicts with current state and federal [law] because it is noted that tenants’ rights related to animal ownership are ordinarily subject to anti-discrimination and/or disability statutes” such as the FHA.

In our view, the Proposed Bylaw’s Requirement to Allow Pets does not conflict with the FHA or the Notice. Nothing in the text of the FHA expressly or impliedly prohibits a local law that requires housing providers to allow pets. In fact, the text of the FHA does not contain any references to animals of any kind.

The U.S. Department of Housing and Urban Development (“HUD”) has authority to administer the FHA and has issued various forms of guidance regarding the FHA.⁴ We are not aware of any HUD guidance that expressly or impliedly prohibits a local law that requires housing providers to permit pets.

The March 23 memo states that “[u]nder the FHA, a housing provider may exclude pets, or charge a fee or deposit for pets, in its discretion and subject to local law, but not for service animals or other assistance animals” and that “[u]nder the FHA, pets are excluded from the definition of ‘assistance animals.’” We believe this statement is referencing a January 28, 2020 notice from HUD on “Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation” (the “Notice”)⁵. The Notice states:

The [FHA] makes it unlawful for a housing provider to refuse to make a reasonable accommodation that a person with a disability may need in order to have equal opportunity to enjoy and use a dwelling. One common request housing providers receive is for a reasonable accommodation to providers’

³ 42 U.S.C. § 3601 et seq.

⁴ 42 U.S.C. § 3608.

⁵ U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity, *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act* (Jan. 28, 2020).

pet or no animal policies so that individuals with disabilities are permitted to use assistance animals in housing, including public and common use areas.

Assistance animals are not pets. They are animals that do work, perform tasks, assist, and/or provide therapeutic emotional support for individuals with disabilities. There are two types of assistance animals: (1) service animals, and (2) other animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (referred to in this guidance as a “support animal”). An animal that does not qualify as a service animal or other type of assistance animal is a pet for purposes of the FHA and may be treated as a pet for purposes of the lease and the housing provider’s rules and policies. A housing provider may exclude or charge a fee or deposit for pets in its discretion ***and subject to local law*** but not for service animals or other assistance animals.⁶

In our view, the Notice merely sets the “floor” by requiring housing providers to permit one category of animals (*i.e.*, assistance animals) under the FHA. Although the Notice contains certain statements differentiating assistance animals from pets, we do not believe that these statements are intended to create a “ceiling” on the types of animals that a housing provider could be required to permit under local law. In fact, the Notice specifically contemplates that a housing provider’s ability to exclude or charge a fee or deposit for pets would be ***“subject to local law.”*** In other words, the Notice recognizes that although the FHA does not address pets, local law could set forth additional requirements that impact a housing provider’s ability to exclude or charge a fee or deposit for pets.

If enacted, the Proposed Bylaw’s Requirement to Allow Pets would simply be an example of a local law that places additional restrictions beyond those already imposed by the FHA on a housing provider’s ability to exclude pets. Two bills seeking to restrict a landlord’s ability to prohibit companion animals currently sit before state lawmakers in California and Massachusetts. California Assembly Bill 2216 is a bipartisan bill before the California Assembly that would “prohibit a landlord from preventing a tenant from owning or otherwise maintaining a common household pet without reasonable justification.”⁷ Massachusetts Senate Bill No. 876 (and similar Massachusetts House Bill No. 1367⁸) would prohibit a landlord from “initiat[ing] action to evict any person from a residential dwelling unit who has a pet without written permission based solely on the presence of the pet until one year after a state of emergency, unless the presence of pets is causing harm to the

⁶ *Id.* (emphasis added) (footnotes omitted).

⁷ Tenancy: common household pets, Cal. Assem., Bill 2216, 2023–2024 Reg. Sess. (2024).

⁸ To maintain stable housing for families with pets in an economic crisis and beyond, Mass. H. Bill 1367, 2023–2024, 193rd Gen. Court (2024).

safety of other residents.”⁹ If enacted, these bills would be examples of state laws that place additional restrictions beyond those already imposed by the FHA on a housing provider’s ability to exclude pets.

The March 23 Memo states that the Proposed Bylaw is “superfluous to the FHA to the extent that assistance animals are permitted in housing under the FHA as a reasonable accommodation.” The Proposed Bylaw relates to pets, not service animals. As a result, in our view, the Proposed Bylaw’s Requirement to Allow Pets is addressing something entirely different from, and not in conflict with, the FHA. Moreover, even if the Proposed Bylaw did overlap with the FHA, Section 816 of the FHA explicitly states that “nothing in [the FHA] shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which [the FHA] shall be effective, that grants, guarantees, or protects the same rights as are granted by [the FHA].”¹⁰

II. TORTIOUS INTERFERENCE WITH CONTRACT CLAIM

While not a focus of the March 23 Memo, during the March 26 Meeting, Town Counsel stated that the Proposed Bylaw could be a source of liability for the Town of Arlington if the Town were to be sued for a tortious interference with contract claim based on the Town’s regulation of the terms of a private contract through the Proposed Bylaw. In the state of Massachusetts, a plaintiff bringing forward a tortious interference claim must prove four elements:¹¹

1. the plaintiff had a contract or a prospective business relationship with another party;
2. the defendant knowingly induced that other party to break the contract or relationship;
3. the defendant’s interference was improper in motive or means; and
4. the plaintiff has suffered from the interference.

In this case, the plaintiff would be a housing provider in the Town of Arlington (“Plaintiff”) and the defendant would be the Town itself (“Defendant”). Although the first element would be satisfied if the Plaintiff had a lease or other housing contract with a third party or a prospective agreement to rent housing, it is unlikely that the second element would be met as this would require a court to find that the Town knowingly induced the third party to break the contract or not go through with the

⁹ An Act to maintain stable housing for families with pets in an economic crisis and beyond, Mass. S., Bill 876, 2023–2024, 193rd Gen. Court (2024).

¹⁰ 42 U.S.C. § 3615.

¹¹ See *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 816 (1990); Restatement (Second) of Torts § 767 (1979).

prospective agreement. Even if a tenant prefers to live in a dwelling where other tenants are not permitted to have pets, the Proposed Bylaw will apply equally to all rental units in the Town of Arlington so it is unlikely that a housing provider's compliance with the Proposed Bylaw alone would cause a tenant to end its relationship with the housing provider. In addition, as amended, the Proposed Bylaw includes a provision for phasing in compliance that states the Proposed Bylaw will take effect with leases that begin, or are renewed, after July 1, 2026. This phase in should prevent the Proposed Bylaw from interfering with any existing contract or prospective agreement.

It is also unlikely that the third element would be met because this would require a court to find that the passing of a bylaw that is within the purview of the Town's power was improper in motive or means. Massachusetts courts have found an "improper motive" in the case of personal grudges, misrepresentations, breaches of contract or breaches of fiduciary duty.¹² Massachusetts courts have also stated that "improper conduct, beyond the interference itself, is 'an element both in the proof of intentional interference with performance of a contract and in the proof of intentional interference with a prospective contractual relationship.'"¹³ Generally, if the defendant was motivated by an intent to harm the plaintiff, improper motive is satisfied.¹⁴ In this case, there is no evidence to suggest that the Town is motivated by an intent to harm housing providers. The passing of the Proposed Bylaw would be in response to a request from a Town resident and local animal advocates. The Findings and Purpose section of the Proposed Bylaw sets forth many detailed reasons for the Town to adopt the Proposed Bylaw, including the increasing the potential for pet adoption, lessening the high costs of sheltering and feeding homeless animals by overwhelmed municipal and volunteer rescue centers, improving civic engagement and public health, and encouraging both individuals and businesses to relocate to a welcoming community. Accordingly, even if the Plaintiff could show that they suffered from the Proposed Bylaw in satisfaction of the fourth element, it is unlikely that the Proposed Bylaw would give rise to a successful tortious interference with contract claim under Massachusetts law.

III. CONCLUSION

For the foregoing reasons, based on the research we have conducted, we believe that: (1) the Proposed Bylaw's Requirement to Allow Pets does not conflict with the FHA; and (2) it is unlikely that the Proposed Bylaw's Requirement to Allow Pets would give rise to a successful tortious interference with contract claim under Massachusetts law.

We are furnishing this memorandum to you at your request. This memorandum is rendered solely for your information and assistance in connection with your advocating for the passing of the Proposed Bylaw and should not be relied upon by any other party. The conclusions set forth herein

¹² See *Cavicchi v. Koski*, 67 Mass. App. Ct. 654, 657 (2006).

¹³ *Id.*

¹⁴ Restatement (Second) of Torts § 767 (1979).

are to the best of our knowledge and belief and are based on: (1) your representations to us regarding the text of the amended version of the Proposed Bylaw; and (2) the laws as of the date hereof. Any changes in any applicable law, regulation, interpretation or other authority could cause our conclusions to change. This memorandum is not binding on any court or Government agency, which could reach a different conclusion from that reached herein.

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Please contact Katilin McGrath at 617-728-7116, Olivia Sedita at 617-728-7157, or Meagan Cox at 617-728-7169 if you have questions regarding this memorandum.